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Federal Communications Commission
Washington, D.C. 20554

Preserving the Open Internet	GN Docket 09-191
Broadband Industry Practices	WC Docket No. 07-52

COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
(CCIA)

ON THE FURTHER INQUIRY
INTO TWO UNDER-DEVELOPED ISSUES IN THE
OPEN INTERNET PROCEEDING

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TABLE OF CONTENTS

The Computer & Communications Industry Association ("CCIA"), by and through counsel, files these Reply Comments in response to the Further Inquiry Into Two Under-Developed Issues in the Open Internet Proceeding released September 1, 2010, in this docket ("Further Inquiry").[1] CCIA cannot support the full exemption of wireless services and "managed" or "specialized services" from the Open Internet protections, because to do so would seem largely to undermine those quite necessary rules. Net neutrality safeguards should be technologically neutral, particularly if the Commission anticipates that wireless broadband will soon become a market substitute for wired connections. CCIA notes, however, that most wireless service providers, those unaffiliated with nationwide wireline carriers, may warrant special consideration due to the characteristics of their network operations, and the Commission has a reasonable basis to tailor the rules for these carriers appropriately.

SUMMARY

CCIA does not accept, and the record does not support, the exemption of an entire class of service from the Open Internet rules. The Commission should adopt neither the proposed exemption for so-called "specialized services", which are impossible to define currently in a meaningful way, nor the proposed industry-wide wireless exemption. These exemptions together could swallow the Open Internet protections entirely.

As CCIA and others have explained, the concept of "specialized services" is an evolving one, and no party has supplied a definition for or a list of these services that has any sure boundaries. And as their comments demonstrate, the broadband Internet Access Providers ("IAPs") have every incentive to define this purported class of service as broadly as possible. The Commission thus should consider applying the more surgical relief of forbearance if, in fact, these

[1] Published at 75 Fed. Reg. 55,297-55,300 (Sept. 10, 2010).

services merit such treatment. If, however, the Commission feels constrained to adopt the "specialized services" exemption, it should also adopt the safeguards described in the Further Inquiry: honest disclosure of terms; transparency of practices; and antidiscrimination requirements in the wholesale market. These safeguards are necessary for the protection of both consumers and market competition, and they carry little regulatory burden.

With regard to wireless services, an industry-wide exemption is not appropriate. The Commission instead should analyze the market conditions in this industry which, according to the Commission's own data, is dominated by Verizon Wireless and AT&T. These carriers have more robust networks, particularly their backhaul networks on which smaller carriers must rely. As such, these carriers — the affiliates of dominant, vertically integrated wireline incumbents — should be expected to comply, subject to reasonable accommodations, with the forthcoming Open Internet rules. They have the market presence, the facilities, and every incentive to operate their networks in unreasonable ways. Smaller wireless carriers, however, should not be required to take on the same degree of regulatory oversight, because they do not have comparable market power or spectrum resources. This more surgical, market-based analysis is the more appropriate tool for identifying the wireless firms that warrant an exemption and those that do not.

I. THE COMMISSION SHOULD NOT EXEMPT "SPECIALIZED SERVICES" FROM THE OPEN INTERNET RULES, AND AT A MINIMUM SHOULD APPLY THE SAFEGUARDS DISCUSSED IN THE FURTHER INQUIRY

The Commission should not exempt "specialized services"[2] from the forthcoming Open Internet rules.[3] As CCIA and other parties have explained, this term is not easily defined or

[2] As the Further Inquiry explains, these services were referred to as "managed or specialized services" in the previous round of this proceeding. Further Inquiry at 2 n.7.

[3] *See* Further Inquiry at 2-3; GN Docket No. 09-191, *Preserving the Open Internet*, Notice of Proposed Rulemaking, 24 FCC Rcd. 13,064, 13,116-17 ¶¶ 148-153 (2009) ("*NPRM*").

contained,[4] such that exempting this purported class of service will lead to one of two regrettable results: either the Commission will be forced to examine every service provider's offerings on an *ad hoc* basis, embarking on a course of hyper-regulation;[5] or the exemption will become boundless and thus swallow the Open Internet rules entirely.[6]

Even those who advocate the exemption of "specialized services" admit that the term is "virtually impossible" to define.[7] Unsurprisingly, they seek an exemption that is extremely broad and open-ended. Comcast, for example, proposes that all "broadband services that receive 'enhanced quality of service'" be included in the exemption.[8] The National Cable & Telecommunications Association asks the Commission to "[b]roadly [e]xempt [m]anaged [s]ervices"[9] including all "content and application services that are transported over the Internet but are offered by the [Internet Service Provider] separately from its Internet access service,"[10] as

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4 GN Docket No. 09-191, Reply Comments of the Computer & Communications Industry Association at 19 (Apr. 26, 2010) ("CCIA 09-191 Reply Comments"); Comments of AT&T Inc. at 7 (Jan. 14, 2010); Comments of CTIA – The Wireless Association at 35 (Jan. 14, 2010); Comments of Google Inc. at 75 (Jan. 14, 2010); Comments of the Open Internet Coalition at 92 (Jan. 14, 2010); Comments of T-Mobile USA, Inc. at 31 (Jan. 14, 2010); Comments of Verizon and Verizon Wireless at 79-80 (Jan. 14, 2010) ("the dividing line between Internet access and 'managed services' is becoming increasingly blurred") (the "Verizon Companies Comments").

5 T-Mobile Comments at 31 (discussing "[t]he pressure to defend the reasonableness of every action"); Verizon Companies Comments at 80 (arguing against "having the Commission be in the business of trying to identify or define permissible 'managed services'").

6 CCIA 09-191 Reply Comments at 19; *see also* Google Comments at 75 ("such services also could be used as an 'escape hatch' for last-mile providers seeking to avoid open Internet obligations"); Open Internet Coalition Comments at 92-93 ("any such category" could be "used by network operators as a pretext for discriminating in favor of affiliated services").

7 GN Docket No. 09-191, Comments of the National Cable & Telecommunications Association at 39 (Jan. 14, 2010); *see also* GN Docket No. 09-191, Comments of Comcast Corporation at 61 (Jan. 14, 2010) ("this is a brand new, loosely defined regulatory concept").

8 Comcast Comments at 63.

9 NCTA Comments at 37.

10 *Id*. at 38.

well as a "general residual category of other services that may require enhancements, prioritization or other customization by ISPs."[11] To exempt all services that purportedly involve "enhanced quality of service" or "may require enhancements, prioritization or other customization" could easily result in the exemption of all Internet traffic.

For these reasons, CCIA continues to oppose exempting so-called "specialized services" from the Open Internet rules.[12] It joins the request of other parties that the Commission take no action with respect to these yet-undefined services until further evidence is presented to support adoption of a different regulatory solution for them. CCIA therefore recommends that the Commission take its proposed "Definitional Clarity" approach in which "the Commission could address the policy implications of such services ***if and when such services are further developed in the market***."[13]

Following on this approach, the Commission could consider using forbearance to deal in a more granular way with "specialized services" than the grant of a full exemption. Under Section 10 of the Communications Act, the Commission retains very broad authority to forbear from imposing any regulation under the Act "to a ... class of ... telecommunications services, in any or some of its or their geographic markets"[14] upon a showing that "enforcement of such

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11 NCTA Comments at 40.

12 AT&T Comments at 7 (Commission should adopt definition of "broadband Internet access" that "will obviate the need to create any ad hoc category of 'managed or specialized' services, which the Commission could neither coherently define nor reasonably regulate"); Google Comments at 76 ("the FCC should decline to further explore this proposed category of services absent additional relevant information from the broadband providers"); Open Internet Coalition Comments at 92 ("it would be premature for the Commission to adopt a separate category for 'managed services' without first establishing the need for such a category").

13 Further Inquiry at 3 (emphasis added).

14 47 U.S.C. § 160(a).

regulation or provision is not necessary"[15] and that forbearance "is consistent with the public interest.[16] Forbearance is an appropriate tool that can be used, via the extant petition process, to lift Open Internet requirements from discrete services such as "specialized services". If and when a broadband IAP develops a service that it believes is functionally separate from its existing Internet access service and merits deregulation, that carrier can file a petition for forbearance under section 10. Like any forbearance petition, the petition should identify precisely the service sought to be deregulated, as well as the market segment and geographic area to which it will be offered, and make the requisite public interest showing. If, after the appropriate notice and comment period, the Commission finds forbearance to be warranted, the petitioner will be given relief for the identified service. During the pendency of the petition, as is the case with any request for forbearance, the Open Internet rules will apply to that service.

The availability of forbearance allows a more surgical resolution to the "specialized services" question than a broad exemption, and would allow the Commission to weigh the relevant factors while broadband technology and the state of competition continue to evolve. Section 10 maps very well to the "specialized services" inquiry in this proceeding, and the Commission thus has no obligation to resolve this issue now, when this supposed class of service is so little understood.

To the extent, however, that the Commission deems it prudent at this time to apply a lesser degree of oversight to "specialized services", it should adopt the five other safeguards discussed in the Further Inquiry. These safeguards are the irreducible minimum of what consumers should expect from broadband IAPs. Indeed, they are simply good business practices that IAPs should follow, and likely would follow in a more competitive market. If the

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15 *Id*. § 160(a)(1).

16 *Id*. § 160(a)(3).

Commission will cull out "specialized services" to any degree from the services that are subject to the Open Internet rules, it should adopt these requirements to ensure that those services are plainly identified, do not impede protected broadband Internet access services offered to the public, and are not offered in an anticompetitive manner.

Limit Specialized Service Offerings — If the Commission adopts "specialized services" as a subclass of unregulated broadband offering, it should make that subclass as finite and narrow as possible. Because these services would not be subject to the protections of the Open Internet rules, it is imperative that the Commission "[a]llow broadband providers to offer only a limited set of new specialized services"[17] as the Further Inquiry suggests. Presently only a few service applications appear to be widely identified as having characteristics of "specialized services": telemedicine, distance learning, public safety, and "smart grid" services.[18] The Commission's focus should begin with these services, which are nascent but could contribute tremendously to societal welfare, as possible "specialized services" to which the full set of Open Internet rules will not apply.

Truth in Advertising — It is reasonable to "[p]rohibit broadband providers from marketing specialized services as broadband Internet access service."[19] If broadband IAPs will be granted deregulatory status for "specialized services," they must not confuse subscribers by suggesting that such services are governed by Open Internet protections. This requirement does nothing more than ensure that IAPs do not falsely advertise their offerings, or pretend that dissimilar services are one and the same. It is also reasonable to "require providers to offer

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17 Further Inquiry at 4.

18 *NPRM*, 24 FCC Rcd. at 13,116 n.266; Google Comments at 76; Comcast Comments at 64-65; NCTA Comments at 38.

19 Further Inquiry at 3.

broadband Internet access service as a stand-alone service, separate from specialized services[.]"[20] This requirement is the twin of the other: by requiring broadband service, which will be subject to Open Internet protections, to be offered as separately from "specialized services", which will remain unregulated, the Commission will ensure that consumers understand that the services are in fact distinct and are treated differently. These requirements comport with this Commission's emphasis on consumer education and fair disclosure,[21] and should be applied specifically to "specialized services" if that class of service is in fact established.

Disclosure — The disclosure of terms and conditions of service is vital to the efficient functioning of the market. It is thus appropriate to

> [r]equire providers to disclose information sufficient to enable consumers, third parties, and the Commission to evaluate and report on specialized services, including their effects on the capacity of and the markets for broadband Internet access service and Internet-based content, applications, and services.[22]

No service provider could have a reasonable objection to an obligation to tell the truth about the nature and operations of their services. This requirement represents the barest modicum of Commission oversight over "specialized services", and is absolutely necessary to ensure that consumers understand the services they are buying and how those services affect the Internet ecosystem.

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20 Further Inquiry at 3.

21 For example, Chairman Genachowski stated in his remarks to the "Consumers, Transparency and the Open Internet" Workshop on January 19, 2010, that

> I strongly believe consumers benefit from free and competitive markets, and that access to information is essential to properly functioning markets. I also believe that policies around information disclosure — like the nutrition and calorie labels on food, and gas mileage estimates on automobiles — can be enormously helpful in ensuring that markets are working.

Available at <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295793A1.pdf>.

22 Further Inquiry at 3.

Non-Exclusivity in Specialized Services — Being unregulated, "specialized services" should not be used as an anticompetitive tool by IAPs to capture an emerging vertical market. To prevent this result, CCIA agrees that "any commercial arrangements with a vertically-integrated affiliate or a third party for the offering of specialized services be offered on the same terms to other third parties."[23] Broadband IAPs are vertically integrated entities with significant control over last-mile transmission facilities.[24] If any of their services will remain unregulated — particularly this new, evolving class of service — then their wholesale products supporting those services must be available to competitors on a nondiscriminatory basis.

Guaranteed Capacity for Broadband Internet Access Service — The Commission should adopt the requirement that "broadband providers ... continue providing or expanding network capacity allocated to broadband Internet access services, regardless of any specialized services they choose to offer."[25] It should also "prohibit specialized services from inhibiting the performance of broadband Internet access services[.]"[26] As explained herein, the definition of "specialized services" is vague and vulnerable to overbroad interpretation. If the Commission adopts the "specialized services" exemption to any degree, broadband IAPs will have the incentive to focus more resources on expanding that class of service than on maintaining and enhancing non-exempt broadband services. To prevent "specialized services" from crowding out standard broadband Internet access, the Commission should expressly require that IAPs retain parity in the way they build, operate, and maintain the facilities that support the two types of service. One

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23 Further Inquiry at 4.

24 *See generally* Susan M. Gately, *et al*., *Longstanding Regulatory Tools Confirm BOC Market Power: A Defense of ARMIS* (Jan. 2010), Economics & Technology, Inc., *available at* <http://www.econtech. com/library/ETILongstandingregulatorytools.pdf>.

25 Further Inquiry at 4.

26 *Id*. at 4.

subscriber's quality of service should not be subordinated to another's simply because the Commission adopted a lenient path for "specialized services".

At this time, the most technologically neutral and administratively efficient way to establish the Open Internet rules is to apply them to all broadband Internet access services without any "specialized services" exemption. If the Commission nonetheless decides that such an exemption must be adopted, it should expressly state that the safeguards discussed above, which simply prohibit deceptive and anticompetitive practices, will govern those services. In addition, the Commission should adopt an exemption that is restrictive rather than permissive, meaning that no retail offering will be included in the "specialized services" exemption unless expressly identified by the Commission. Any party seeking to expand that class of service should be required to make a showing that a particular service is materially different from typical broadband Internet access in order to obtain that relief. In this way, the Commission can help prevent the unwanted result in which the "specialized services" exemption renders the Open Internet rules toothless and inapplicable.

II. THE COMMISSION SHOULD NOT EXEMPT MOBILE SERVICES FROM THE OPEN INTERNET RULES ENTIRELY, BUT MAY ACCOMMODATE THE NETWORK LIMITATIONS OF SMALLER WIRELESS CARRIERS

The Further Inquiry also requests that parties "update the record on certain questions related to the application of openness principles to wireless."[27] It acknowledges that the recent Verizon-Google joint proposal, which seeks to exempt all wireless services from the Open Internet rules (except the transparency requirement),[28] has, in part, spurred this request for further

[27] Further Inquiry at 4.

comment.[29] CCIA cannot support an industry-wide exemption for wireless services, but rather suggests that the Commission review the market conditions in this industry and apply the forthcoming rules to carriers that demonstrably enjoy market power.

As a general matter, the Commission should strive for regulatory parity in its policies, especially where the services at issue are, or likely soon will be, market substitutes. For this reason, CCIA has argued that mobile broadband providers be subject to all six net neutrality principles proposed by the Commission for wireline providers, albeit with the understanding that, due to the unique network management challenges associated with the use of the radio spectrum, the six principles may "not apply to wireless carriers *in all the same ways* that they apply to wireline providers."[30]

Just as the Commission should take into account relevant technical differences that make management of wireless broadband networks more challenging and complex than the management of wireline broadband networks, the Commission should also take into account the market realities that make it more difficult for smaller wireless providers to deal with the unique challenges of wireless broadband network management than the two largest and vertically integrated providers, Verizon Wireless and AT&T. According to data released by the Commission in the CMRS Report, Verizon Wireless and AT&T held 61% market share in 2008, the most recent period for which information was available.[31]

The Commission itself has acknowledged the market share and spectrum holding advantages of AT&T and Verizon in its recent decision approving the acquisition of SkyTerra

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28 *Available at* <http://www.scribd.com/doc/35599242/Verizon-Google-Legislative-Framework-Proposal>.

29 Further Inquiry at 4.

30 CCIA 09-191 Reply Comments at 17 (emphasis in original).

31 Economics and Technology, Inc., *Views and News* at 1 (July 2010).

Communications by Harbinger Capital Partners.[32] As a condition of approval, the Commission required the applicants to obtain prior Commission approval before making spectrum available to AT&T and Verizon[33] and allowing traffic to these two largest terrestrial mobile providers to account for more than 25 percent of SkyTerra's total traffic on its terrestrial network in any Economic Area.[34]

In addition, AT&T and Verizon are unique among mobile broadband providers in both their incentives and their capacity to avoid operating their mobile broadband networks in a manner that threatens existing wireline broadband revenue. In an *ex parte* filing in the Commission's National Broadband Plan proceeding, the U.S. Department of Justice took note of this fact, stating that

> two of the major providers of [mobile broadband services] (Verizon and AT&T) also offer wireline services in major portions of the country, raising the question of whether they will position their [Long Term Evolution] services as replacements for wireline services, either within the regions where they provide wireline services or elsewhere.[35]

In addition, CCIA has noted in the "Third Way" proceeding that "in the wholesale market, smaller carriers are largely dependent on the two largest carriers, AT&T and Verizon, for high-capacity transport and backhaul services."[36] Given the importance of wireless backhaul to

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32 *SkyTerra Communs., Inc., Transferor, and Harbinger Capital Funds Partners, Transferee*, IB Docket No. 08-184, Memorandum Opinion and Order and Declaratory Ruling, 25 FCC Rcd. 3059 (2009) ("*SkyTerra Order*").

33 *Id.*, Attachment 2 (Conditions), 25 FCC Rcd. at 3098.

34 *Id.*, Attachment 2 (Conditions), 25 FCC Rcd. at 3099.

35 GN Docket No. 09-51, *Ex Parte* Submission of the United States Department of Justice at 11 (Jan. 4, 2010).

36 GN Docket No. 10-127, Reply Comments of the Computer & Communications Industry Association at 14 & n.48 (Aug. 12, 2010) (quoting GN Docket No. 09-47, NBP Public Notice # 11, Comments of United States Cellular Corporation at 3 (Nov. 4, 2009); Comments – NBP Public

the viability of any mobile broadband offering, this market dominance — in a crucial mobile broadband input market — is significant.

Other characteristics of today's wireless market likewise warrant the Commission's consideration. For example, Verizon Wireless and AT&T have an incentive to avoid operating their mobile broadband networks in direct competition with their wireline affiliates, and they hold dominant positions with regard to commercial wireless spectrum. These factors support the application of the full complement of net neutrality requirements, as adapted to accommodate "reasonable network management practices," on Verizon Wireless and AT&T.

For the smaller, unaffiliated wireless carriers, however, whose market presence is dwarfed by the largest two carriers, the Commission should impose the Open Internet rules in a more restrained fashion. This modified approach should apply to carriers other than AT&T and Verizon Wireless, with the exception of the transparency obligation which can and should be enforced on all carriers to the same degree. Smaller carriers already are hamstrung by their dependence on the largest carriers for transmission and backhaul, and do not have spectrum or networks as robust as these vertically integrated carriers. It would be not only burdensome but unnecessary to regulate their broadband Internet access service as rigorously as that of Verizon Wireless and AT&T.

For these reasons, the Commission should employ a market-based, rather than technology-based, analysis for determining whether the wireless exemption should be adopted. In this way, the exemption will be appropriately tailored for protecting consumers while not hindering the ability of smaller carriers to provide service.

Notice # 11 of T-Mobile USA, Inc. at 8 (Nov. 4, 2009) ("a number of ILECs have no plans to offer fiber-based connectivity and their supplies of DS1s and DS3s may be limited. Under these circumstances, the market has failed and Commission intervention is necessary … .")).

CONCLUSION

For all these reasons, the Commission should not exempt "specialized services" or all wireless services from the forthcoming Open Internet rules entirely. At a minimum, the safeguards discussed in the Further Inquiry should be applied to a narrow, clearly identified set of "specialized services", and the demonstrably dominant wireless providers should be subject to the full complement of Open Internet protections.

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